DIGEST OF OTHER RECENT VIRGINIA DECISIONS.

Supreme Court of Appeals.

Note.—In this department we give the syllabus of every case decided by the Virginia Supreme Court of Appeals, except of such cases as are reported in full.

CHESAPEAKE & O. RY. CO. *v.* MELTON.

March 10, 1910.

[67 S. E. 346.]

1. Master and Servant (§ 258*)—Injury to Servant—Declaration—Sufficiency.—A declaration, in an action for injuries to a section foreman, which alleges that while he was repairing a switch in a railroad yard an engine approached the switch, that he fixed the switch temporarily so that the engine could proceed, that the employees knew that the switch was out of order, and that the provision for the engine passing was of temporary character, intended only to permit the engine to pass down the track, and that it should not pass back over the switch until directed to do so by plaintiff, that it was the duty of the railroad to use proper care to provide plaintiff with a safe place to work and to exercise proper care not to run its engines and trains on him, that its employees negligently ran the engine without any signal or without giving plaintiff any warning, though the employees knew that plaintiff was at work on the switch, etc., is good as against a demurrer.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 258.* 11 Va.-W. Va. Enc. Dig. 239, et seq.; 9 id. 718; 14 id. 697, 832.]

2. Pleading (§ 48*)—Declaration—Sufficiency.—A declaration in tort must state sufficient facts to enable the court to say on demurrer whether, if the facts stated were proved, plaintiff could recover.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 105; Dec. Dig. § 48.* 13 Va.-W. Va. Enc. Dig. 213, and references supra.]

3. Negligence (§ 111*)—Actions for Negligence—Declaration—Sufficiency.—A declaration in an action for negligence must state with reasonable certainty the facts relied on to establish negligence, and show that the negligence relied on was the proximate cause of the injury, and it is not sufficient to allege negligence in a general way, or to say that plaintiff was injured through the negligent conduct of defendant.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 182-184; Dec. Dig. § 111* 10 Va.-W. Va. Enc. Dig. 399; 14 id. 770.]

4. Master and Servant (§ 258*)—Injury to Servant—Declaration—Sufficiency.—In an action for injuries to a section foreman, a decla-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

ration alleging in one count that plaintiff when injured was engaged in transferring his tools and men from one part of a railroad yard to another to do repair work, and that a collision occurred between a hand car under his control and an engine, and that as he was on his journey on the hand car an engine was run against the hand car causing the injury complained of, and alleging in another count that the accident occurred while plaintiff was endeavoring to remove the hand car from the track to prevent the same from being run into by the engine, etc., is insufficient on demurrer for failure to allege any facts showing negligence on the part of the defendant, though it is alleged that the engine was willfully, carelessly, negligently, and wrongfully run into the hand car.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 816-836; Dec. Dig. § 258.* 10 Va.-W. Va. Enc. Dig. 399; 14 id. 770.]

5. Negligence (§ 112*)—Wantonness—Pleading—Sufficiency.—The facts relied on to establish willful and wanton negligence must be stated with reasonable certainty, and it is not sufficient to charge that plaintiff was willfully and wantonly injured.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 185; Dec. Dig. § 112.* 10 Va.-W. Va. Enc. Dig. 399; 14 id. 770.]

6. Pleading (§ 11*)—Averment of Facts—Sufficiency.—A declaration must contain a concise statement of the material facts on which a recovery is demanded; but the evidence relied on to sustain the averments need not be pleaded.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 31; Dec. Dig. § 11.* 11 Va.-W. Va. Enc. Dig. 243; 14 id. 833.]

7. Trial (§ 330*)—General Verdict—Defective Pleadings—Effect.—Where the first count of the declaration is good and the other counts are bad, a general verdict must be set aside for the refusal to sustain a demurrer to the defective counts.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 779; Dec. Dig. § 330.* 13 Va.-W. Va. Enc. Dig. 613.]

Error to Circuit Court of City of Newport News.

Action by A. L. Melton against the Chesapeake & Ohio Railway Company. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded.

R. G. Bickford and *S. O. Bland,* for plaintiff in error.
Ashby & Read, for defendant in error.

NOTE.

The holding of the seventh and last headnote here is typical of a ruling that has been made several times by the Supreme Court of Appeals, as to the effect of improperly overruling a demurrer to

*For other cases see same topic and section NUMBER in Dec. and Am. Digs. 1907 to date, and Reporter Indexes.

the whole declaration and each count thereof where there are one or more faulty counts in the declaration. It is held that a general verdict must be set aside.

It may be interesting to consider this ruling with especial reference to § 3389, Va. Code, 1904, which reads thus: **"When faulty count disregarded; when verdict good.** Where there are several counts, one of which is faulty, the defendant may ask the court to instruct the jury to disregard it; yet, if entire damages be given, the verdict shall be good. (Code 1849, p. 672, c. 177, § 12.)"

The West Virginia statute, § 3983, is the same, except that it begins with the word "when," and the punctuation is slightly different, but not so as to change the meaning.

The statement of the case and opinion, so far as concerns this point, is as follows, by Harrison, J.: "This action of trespass on the case was brought by A. L. Melton to recover of the Chesapeake & Ohio Railway Company damages for injuries alleged to have been caused by its negligence.

"The case involves two separate and distinct alleged causes of action, one of which arose in August, 1907, and the other in January, 1908. There was a demurrer to the declaration and to each of its three counts, which was overruled. Upon the trial there was a demurrer to the evidence, and the jury brought in a general verdict, assessing the plaintiff's damages at $777.50. Thereupon the court overruled the demurrer to the evidence and gave judgment in favor of the plaintiff for the sum ascertained by the verdict of the jury. To that judgment this writ of error was awarded. The first assignment of error is to the action of the circuit court in overruling the demurrer to the declaration and to each count thereof."

The court held that the first count was good and the demurrer thereto properly overruled. The second and third counts, describing the other alleged cause of action, were held not good. The court then said: "The verdict of the jury being general, the court cannot say whether it rests upon the case stated in the first count of the declaration or upon that alleged in the second and third counts, which are bad. In this situation, the judgment complained of must be reversed, for the error of the court in not sustaining the demurrer to the second and third counts of the declaration, the verdict of the jury set aside, and the case remanded to the circuit court for a new trial, with leave to the plaintiff, if he be so advised, to amend the second and third counts of his declaration. Reversed."

Upon this subject, Mr. Minor says, IV Minor's Inst., pt. 1, p. 906 (3rd Ed.): "At common law, if there be several counts in a declaration, and one of them be faulty, and the verdict, being for the plaintiff, does not ascertain (as generally it does not) upon which of the counts it was founded, it is necessary to arrest the judgment, because it may be that the jury have based their verdict upon the faulty count. This principle is not illogical, although it would seem that it would have been not less logical to assume that the verdict was based upon the good count. At all events, the legislature has deemed it expedient so to provide, and it is accordingly enacted, that where there are several counts, one of which is faulty, the defendant (instead of demurring to it, as at common law would be proper) may ask the court to instruct the jury to disregard it; yet if entire damages be given, the verdict shall be good. (V. C. 1873, ch. 173, § 12; V. C. 1887, ch. 166, § 3389.)" Mr. Barton's comment is the same, practically, except that he does not say that the legislature have deemed it expedient "so to provide," i. e., that the presumption shall

be that the verdict was based on the good count. See 2 Bart. Law Prac., p. 695.

The previous cases are Newport News, etc., Co. *v.* Nicolopoolos, 109 Va. 165, 63 S. E. 443; Norfolk, & W. Ry. Co. *v.* Stegall, 105 Va. 538, 54 S. E. 19. These cases and the principal case all hold that, where one or more counts of a declaration are bad, and a demurrer to the declaration and each count overruled, leaving a bad count in, a general verdict must be set aside, although there be still a good count to support it, unless the court sees that the defendant was not and could not have been injured.

Thus it is said in Newport News, etc., Co. *v.* Nicolopoolos, 63 S. E. 445, that : "There are cases in which judgments have been sutained where demurrers to some of the counts of the declaration have been improperly overruled, but it is only when the court can see that no prejudice did, or could have, resulted to the defendant from the error. Standard Oil Co. *v.* Wakefield, 102 Va. 824, 834, 47 S. E. 830, 66 L. R. A. 792."

The rule, in the absence of statute, upon this point is laid down thus in 6 Am. & Enc. of Pl. & Pr., p. 368; "Where a complaint contains two or more paragraphs, the overruling of a demurrer to a bad paragraph thereof is a fatal error and will work a reversal of the judgment unless it appears that such judgment was not rendered upon such bad paragraph but solely upon the good paragraph or paragraphs; even though there are other good paragraphs embracing the same averments." The cases cited are only from Alabama and Indiana, strange to say.

Again, citing as authority Weir *v.* State, 96 Ind. 311, it is said: "By overruling the demurrer harm is done the demurrant from the fact that by such ruling the court adjudges that the plaintiff, in order to make out his case has only to prove that which is contained in the paragraph to which the demurrer is overruled."

Then it is added, that, "although a demurrer may have been improperly overruled, yet, if the demurrant was not harmed by such ruling, judgment will not be reversed on account of the harmless error."

This is precisely the principle upon which our court of appeals has proceeded in its treatment of such cases, and if the statute above cited was not intended to change this rule, then this is undoubtedly right.

In none of these cases, however, is the statute alluded to, and of course no reason given as to why it does not apply, as such an application did not seem to occur to the court as possible. Still, the fact that the West Virginia Court of Appeals, in construing the same statute, concluded, with equal unhesitation that it did and does apply to just such cases, may at least suggest that there may be two sides to the question. This the West Virginia court did in Ray *v.* Chesapeake, etc., Ry. Co. (W. Va.), 54 S. E. 413, a case precisely similar to the one we are considering, except that the counts were based upon the same cause of action. The court, speaking by Brannon., J., said (at p. 414): "If even I am wrong in saying that counts 1 and 2 are bad, as the third and fourth counts are good, the verdict being general, not on any particular count, the bad counts cannot reverse, as § 13, c. 131, Code 1899, says that where there are several counts, one of which is faulty, if entire damages are given, the verdict is good. As you cannot say on which count the jury found, the common law said that no judgment could be given; but the stat-

ute changes the rule. Cooke *v.* Thornton, 6 Rand. 11; 2 Barton, L. Prac. 695."

Thus these courts have construed the same statute in opposite ways, and one or the other must be wrong.

Considering this statute in the light of the reason for it, which was the desire to save a verdict which had a good count to rest upon from being necessarily set aside because of the common law principle above set out, and yet enable the defendant to prevent the jury from considering the faulty count or counts, it is reasonable to assume that there was no intention to require of the defendant a vain thing. If we apply the statute to cases like this, where there has been a demurrer to each count overruled, it would render nugatory the provision allowing the defendant to move the court to direct the jury to disregard the faulty count or counts, for of course such a request would be vain. And so in any case where the count in question is not admittedly, or in the judgment of the trial court, faulty, as otherwise the request to so direct the jury would be of course refused, and the result, as far as injury to the defendant goes, would be precisely as if he had demurred to such count.

But if we regard the motion suggested by the statute merely as a substitute for demurring generally to the declaration, and so Mr. Minor would seem to have regarded it, it is to be limited in its scope to cases where the defendant chooses to adopt the course suggested, and even where he does so, and the trial court, by no fault of his be it remembered, refuses his request, then if, on error, the count objected to is held faulty, there has been error, which, in case of a general verdict, unless it be plainly nonprejudicial, is ground for setting it aside. There is no reason for the application of the statute to such a case. In other words the verdict is only sustained "where there are several counts, one of which is faulty," and the defendant chooses to ask the court to instruct the jury to disregard it, instead of demurring to the declaration, and the court accedes to his request. If it refuses, or if defendant demurs to the faulty count separately, and the demurrer is overruled, the result is the same and the statute does not apply. There is not a word, it is submitted, which necessarily militates against this construction, and our court would seem to be right in construing it as it has, and the West Virginia court wrong, although there is room for doubt.

The only early civil case in which this statute was considered, was Cooke *v.* Thornton, 6 Rand. 8, and that was a case where there had been a *general* demurrer to the *entire* declaration, but no formal judgment upon the demurrer. The reversal does not seem however to have been for error in respect to the demurrer, but upon the merits. Two of the judges rendering opinions touch upon the statute and its applicability to the case. As a slight indication of a different intention in the legislature in enacting the first form of this statute (1 Rev. Code, 1819, 512, § 104), it may be noteworthy that in its earlier form, the provision allowing the defendant to ask the court to instruct the jury to disregard the count, is put at the end, after the declaration that the verdict shall be good, so that the statute read: "When there are several counts, one of which is faulty, and entire damages are given, the verdict shall be good; but the defendant may apply to the court to instruct the jury to disregard the faulty counts." 1 Rev. Code, 512, § 104. Whether this meant that the verdict was to stand in every such case, merely allowing the defendant to make the motion provided for in cases where it would do any good, is a question not easy to answer. J. F. M.